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THOMAS D. HALL
JUN 14 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.

JOHN T. CARLON, JR.,
Respondent.
_____/

Case No.: 95.539
TFB No.: 99-50.838 (17H)

MAIN BRIEF OF RESPONDENT

JOHN T. CARLON, JR.
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PREFACE

RESPONDENT PETITIONS for review of Report of Referee dated March 9, 2000, recommending sanctions including suspension for 91 days.

In this, Respondent's main Brief, the following symbols will be employed:

Tr. - Transcript of Testimony
App. - Respondent's Appendix
WOODBURN - Complaining witness Darlean Woodburn

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF FACTS

Respondent, John T. Carlon, Jr., has petitioned for review of the Report of Referee dated March 9, 2000, recommending Respondent be found guilty of violation of R.Regulating Fla. Bar 4-1.5(a) and that Respondent be suspended for a period of 91 days, and that he make restitution to Darlean Woodburn in the amount of $3,340.10 plus interest.

Pursuant to R. Regulating Fla.. Bar 3-7.7 (a)(2) such review is mandatory.

In December, 1997, the exact date apparently being in controversy, one Darlean Woodburn ("Woodburn") contacted Respondent by telephone to inquire about procuring an amendment to her Arizona divorce decree, (and the property settlement agreement on which it was based), the effect of which amendment would be to alter the amount of the benefit to which Woodburn would be entitled upon her retirement from over 20 years' service in the employ of the United States Internal Revenue Service.

A few days after that telephone conversation, Respondent met with Woodburn initially, submitted a proposed employment contract calling for his services to be compensated at the hourly rate of $250.00 plus stated expenses, in addition to a one-time administrative fee of $500.00 (app. 11). At that meeting, Woodburn delivered several pages of materials she had voluntarily prepared for Respondent, copies of which are part of the record herein (App. 16), and executed the fee agreement, tendered her by Respondent at that meeting.

After Woodburn signed the employment contract and paid the retainer/deposit to him, Respondent then reviewed the current Martindale-Hubbell biographical listings of Arizona attorneys in the area of Woodburn's original divorce/dissolution of marriage proceeding, drafted an inquiry letter (which Woodburn approved) and directed it to attorneys selected by Respondent from the

Martindale listings.

Thereafter, with Woodburn's approval, Respondent drafted a second letter, the effect of which was to substantially modify the request for references contained in his earlier group of letters.

Thereafter, again with Woodburn's approval, Respondent drafted a third letter to attorneys in Arizona who would more likely be interested in malpractice claims.

The Florida Bar contends that Respondent's above described activities do not constitute legal services, have no value as such, and that Respondent's charging Woodburn in accordance with the provisions of their contract are therefore violative of R. Regulating Fla. Bar.

No evidence was offered at the trial of the value of Respondent's time for performing what The Florida Bar claims to be non-legal services.

At the trial, Respondent's billing and the final accounting he provided Woodburn was received into evidence. There is no evidence to indicate any impropriety in any of the billings and accountings of Respondent, or any other deviations of Respondent from his contractual obligations to Woodburn.

There is a dispute regarding the nature of a portion of the conversation which took place at the meeting prior to the execution of the agreement: Woodburn contending that Respondent made a material misrepresentation to her, on which she reasonably relied; Respondent essentially denying any such misrepresentation.

At the trial herein, Respondent's efforts to cross examine Woodburn with respect to her experience and responsibilities with the Internal Revenue Service were thwarted when the Referee ruled his questioning "irrelevant". (Tr. 37)

Respondent's further efforts to cross examine Woodburn with respect to her marital history (and prior experience with several domestic relations legal systems) were likewise ruled irrelevant by

the Referee. (Tr. 37)

Respondent, during the course of his representation of Woodburn, submitted statements accounting for the time actually expended by him on Woodburn's behalf. No objection was ever made by Woodburn to any specific time charge of Respondent. The sole complaint voiced by her near the conclusion of Respondent's representation was that the total amount of Respondent's charges were excessive.

Shortly after Respondent, with Woodburn's acquiescence, mailed inquiry letters to a third group of Arizona attorneys, apparently qualified to represent her, Woodburn secured an Arizona attorney independently, and notified Respondent. Respondent replied/responded by immediately suspending any further activity in her file and so advised the client. Again, Woodburn raised no objection.

When he was later notified by Woodburn that she had obtained what she now considered a satisfactory resolution of her claim, and did not think a malpractice action against her former attorney was justifiable, Respondent promptly closed the file, furnished Woodburn with his final statement and accounting with his trust account check for the balance due her, pursuant to the agreement they had each signed and which check Woodburn negotiated.

Thereafter, Woodburn filed her Complaint with The Florida bar, and this proceeding ensued in which Respondent is charged with violation of R. Regulating Fla. Bar 4-1.5(a) charging a clearly excessive fee).

Prior to the February 25, 2000, final hearing herein, Respondent requested a pre-trial conference (App. 22) which request was ignored by the Referee. Also, prior to the final hearing, certain improper ex parte communications admittedly took place between Bar Counsel and the

Referee, and Respondent promptly filed his Motion for Order of Disqualification upon becoming aware of those facts. Notwithstanding the fact that Respondent's Motion was directed to the attention to the Supreme Court, the Referee entered an Order denying Respondent's Motion on February 23, 2000, and the Supreme Court entered its order denying Respondent's Motion "without prejudice" on February 24, 2000 (App. 45). Respondent has, contemporaneously with the filing and service of this Brief, renewed his Motion for Order of Disqualification and has now coupled it with his Motion to Dismiss this proceeding.

At the conclusion of the final hearing/trial herein, the Referee entered the Order herein sought to be reviewed, recommending finding Respondent guilty of charging a clearly excessive fee, and recommending (exactly as requested by Bar Counsel) sanctions, including suspension of Respondent for 91 days.

Respondent petitions for review of the Report and Recommendations of the Referee presenting the following specific issues for the Court's consideration:

1. Whether Referee and Bar Counsel were guilty of ethical violations indelibly tainting the proceedings; and

2. Whether Respondent should have been afforded the pre trial conference he requested; and

3. Whether Respondent should have been permitted to cross examine the complaining witness with respect to her employment responsibilities with the United States Internal Revenue Service and to her marital history; and

4. Whether the evidence was sufficient to sustain the finding and recommendations of the Referee.

SUMMARY OF ARGUMENT

I. WHETHER REFEREE AND BAR COUNSEL WERE GUILTY OF ETHICAL VIOLATIONS INDELIBLY TAINTING THESE PROCEEDINGS

The Referee and The Florida Bar, through tits designated Bar Counsel have willfully and intentionally violated provision of the Code of Judicial Conduct and Rules regulating The Florida Bar to such an extent that this Court can only restore public confidence in this process by dismissal of this case.

The ex parte communications engaged in by Bar Counsel and the Referee were unauthorized and improper, and inasmuch as the Referee made no provision for notification of Respondent of either the fact of or the content of such communications, the wrong addressed by that portion of Canon 3, Code of Judicial Conduct, is compounded.

II. WHETHER RESPONDENT SHOULD HAVE BEEN AFFORDED THE PRE-TRIAL CONFERENCE HE REQUESTED

Inasmuch as the Florida Rules of Civil Procedure mandate a pretrial conference on the request of a party, and Respondent did request one, the Referee's ignoring Respondent's request was clearly erroneous.

III. WHETHER RESPONDENT SHOULD HAVE BEEN PERMITTED TO CROSS EXAMINE COMPLAINING WITNESS WITH RESPECT TO HER EMPLOYMENT RESPONSIBILITIES WITH THE UNITED STATES INTERNAL REVENUE SERVICE AND TO HER MARITAL HISTORY

The major contested issue in the case is WOODBURN'S alleged gullibility to an alleged representation of Respondent. Cross examination on this subject would have naturally weakened

weakened WOODBURN'S credibility, and since a witness's credibility is always a proper subject of cross examination, clearly it was error to deny Respondent the right to cross examine in this area.

IV. WHETHER EVIDENCE WAS SUFFICIENT TO SUSTAIN THE FINDINGS AND RECOMMENDATIONS OF THE REFEREE

WOODBURN's employment record of nearly 20 years with the United States Internal Revenue Service, coupled with her actions in providing unsolicited material to Respondent at the time of their first meeting when she signed the employment contract with Respondent, cast substantial doubt on the credibility of her claim of gullibility, as does her silence in her earlier correspondence with respect to Respondent's alleged misrepresentation.

The clear error with respect to Respondent's cross examination efforts mandates at the minimum a new trial before a different referee.

The draconian sanctions recommended by the Referee should not be sustained in view of the circumstances and murky legal issues prosecuted in this case.

The Florida Bar has not offered any proof of at least one element of the offence with which Respondent is charged. Absent proof of <u>all</u> elements of the offence, no finding of guilt would be proper.

ARGUMENT

WHETHER REFEREE AND BAR COUNSEL WHERE GUILTY OF ETHICAL VIOLATIONS INDELIBLY TAINTING THESE PROCEEDINGS.

The Canons of Judicial Ethics are specific in their condemnation of ex parte communications. Those that fall outside the purview of the enumerated exceptions are absolutely forbidden.

Canon 3B (7)(a), Code of Judicial Conduct, specifies three instances where ex parte communications under certain conditions are authorized:

1. Scheduling purposes, or
2. Administrative purposes, or
3. Emergencies.

Even then the judge must make provision to notify all other parties of the substance of the ex parte communication.

This Referee is clearly subject to the Code of Judicial Conduct, which defines "Judge" as "Article V, Florida Constitution judges and where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge."

With respect to this issue, there is no factual dispute, most of the information coming from the response of Bar Counsel to Respondent's original Motion for Order of Disqualification and the remainder are part of the record.

The original order of this Court referring the matter to a Referee to be selected by the Chief Judge of the 15th Judicial Circuit, mandated the referee's report to be filed within 180 days unless good cause existed for an extension. In spite of discovery being completed several weeks earlier, this case

was not noticed for trial until January 7, 2000. No reason of any kind for that delay appears of record.

After trial was scheduled and after receiving a prompt from the Clerk's office, the Referee initiated an ex parte communication with Bar Counsel seeking advice on responding to that communication. (App. 41)

Bar Counsel then undertook to secure an extension of time from this Court on behalf of the Referee - obviously with the concurrence of the Referee. Clearly those actions go far beyond the exceptions listed in Canon 3.

No emergency or scheduling problem was presented because R. Regulating Fla. Bar 3-7.6 (k)(1) specifically provides that failure to comply with the time limitation is not jurisdictional.

Nor does this fit the "administrative" category. Here Bar Counsel assumed the responsibility of representing the Referee and preserving her professional reputation and fitness for future judicial responsibilities. Finally, the Referee made absolutely no provisions for notification of Respondent of the subject ex parte communications as mandated by canon 3.

R. Regulating Fla. Bar. 4-8.4(b) prohibits attorneys from knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. By his own admission, Bar Counsel violated that provision.

Finally, the failure of The Florida Bar in these proceedings to condemn or even disapprove the improper conduct of the Referee and Bar Counsel must now be considered a ratification rendering any further action by it indelibly tainted as well.

Speaking to a different violation of Canon 3, this court has recently reiterated in strong terms the proposition that it is the responsibility of judges to serve the public interest by promoting justice and to avoid in official conduct any "impropriety or appearance of impropriety". In Re: Schwartz, ___

So. 2d ____, (Fla. 2000) (emphasis supplied). The court further observed that the rule of law itself is jeopardized when people's confidence that justice will be fairly administered in an impartial manner is subverted.

In another recent case dealing with this specific problem, a Court found that 17 improper ex parte communications between judge and prosecution and investigators was so egregious that Defendant's due process rights were irretrievably compromised mandating dismissal of certain criminal counts. State v. Marks, et al., ____ So.2d _____ (Fla. 4th DCA 2000).

Admittedly, a different factual situation is presented here, but Respondent submits the misconduct of the Referee and Bar Counsel, a willful and intentional violation by the very people charged with enforcement of the Rules Regulating The Florida Bar, is at least equally egregious, and the effect of any finding (other than outright acquittal) must be irretrievably compromised in the eyes of the increasingly cynical public by the misconception of lawyers and judges protecting each other. Twice in its opinion the Marks court observed that it could not "unring the bell" caused by other judicial misconduct and its effects. Respondent submits that same problem is presented here.

Pursuant to the Rules Regulating The Florida Bar, The Florida Bar is apparently the only prosecuting authority for ethical or rule violations. Respondent has found no provision for a substitution of prosecutors.

The conduct of the Referee, Bar Counsel and The Florida Bar unfairly and improperly places this court in a dilemma not of its own making, but a dilemma it must nevertheless deal with. Respondent respectfully submits that of all the choices theoretically available to the Court, the only way to avoid any appearance of impropriety in the administration of justice is to dismiss these proceedings.

WHETHER RESPONDENT SHOULD HAVE BEEN AFFORDED THE PRE TRIAL CONFERENCE HE REQUESTED

The Florida Rules of Civil Procedure apply to disciplinary proceedings except where specifically otherwise provided in Rules Regulating The Florida Bar R. Regulating Fla. Bar 3-7.6 (e)(1). Fla. R.Civ.P. 1.200 (b) mandates that on timely request of any party the court schedule a pretrial conference to consider matters enumerated in the rule. Nothing in Rules Regulating The Florida Bar operates to alter, amend or modify that provision.

Trial by ambush is no longer favored in Florida and had Respondent's request been granted, the Referee's ruling and cross examination latitudes could have been anticipated, or prevented outright by allowing Respondent time to prepare a memorandum in support of his position.

Specific damage incurred by Respondent; by the wholly unexpected and unforeseeable rulings of the Referee with regard to his ability to cross examine the complaining witness, is described elsewhere, but the pre-trial conference could have crystallized other issues rendering appellate review less likely.

These have been discussed in detail elsewhere in Respondent's Argument and need not be repeated here.

Clearly, the Referee erred in ignoring Respondent's timely request for Pre-Trial Conference.

WHETHER RESPONDENT SHOULD HAVE BEEN PERMITTED TO CROSS-EXAMINE THE COMPLAINING WITNESS WITH RESPECT TO HER EMPLOYMENT RESPONSIBILITIES WITH THE UNITED STATES INTERNAL REVENUE SERVICE AND TO HER MARITAL HISTORY

"A witness's credibility is always a proper subject of cross-examination. Whenever witnesses take the stand, they place their credibility in issue. For purposes of discrediting a witness, a wide range of cross-examination is permitted in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach that witness." (Citations omitted). 24 Fla. Jur. 2d Evidence and Witnesses, Section 868. (Emphasis supplied)

Information with respect to the complaining witness's employment responsibilities over her 20 year history of employment with the United States Internal Revenue Service, as well as with respect to her extensive marital history, is certainly relevant to one of the few factual issues in this case - the credibility of her gullibility claim.

Here, of course, there is no question with respect to limitation of range of cross-examination. By sustaining The Florida Bar's objections on grounds of relevancy, the Referee effectively prevented any cross-examination with respect to those proper areas (Tr. 37).

"Cross-examination of a witness on the subjects covered in direct examination is an invaluable right, and it cannot be said that a ruling denying that right does not constitute harmful and fatal error.(emphasis supplied) Whenever counsel is within his or her rights and is seeking ... to bring a helpful light on the subject of the inquiry, it is harmful error to deny that right." (Citations omitted). 24 Fla. Jur. 2d Evidence and Witnesses, Section 910.

WHETHER EVIDENCE WAS SUFFICIENT TO SUSTAIN THE FINDINGS AND RECOMMENDATIONS OF THE REFEREE

Ordinarily a referee's findings of fact are presumed correct at this stage of proceedings, but this Court has stated the exceptions to that proposition to be where (1) they are clearly erroneous or (2) lacking in evidentiary support. The Florida Bar v. Garland, 651 So.2d 1182 (Fla. 1955).

Here, the complaining witness told her story of alleged manipulation by use of a "hook" to the effect that Respondent told her she had to comply with Florida law. Respondent denies the tenor of any such conversation, but cannot honestly deny the possibility of uttering those words in a different context.

The vulnerability of a 20-year I.R.S. employee to any such misrepresentation is - to be charitable - doubtful. Her specific I.R.S. experience was not permitted to be inquired into, but Respondent's contention of the sheer improbability of that alleged scenario could have been buttressed by disclosure of a more accurate description of her degree of sophistication acquired in her employment of nearly 20 years. The same is true for inquiry into her previous marital history also neither of which Respondent was permitted to inquire into on cross-examination.

We do know, however, that before meeting Respondent for the first time, this witness prepared a detailed list of goals, relative income histories of her and her former spouse with graphs, and even specific legal steps she desired to take. Respondent submits that these are the steps of a knowledgeable and determined ex-wife, well-versed in the legal process, and certainly not taken in by anything as transparent as the scenario she now urges.

Respondent also submits that the first time the scenario is even mentioned by WOODBURN is after her Complaint to The Florida Bar is filed. No hint of its existence appears in any of

WOODBURN's earlier correspondence.

The Referee's conclusion simply does not comport with reason and common sense. It therefore follows that the Referee's finding should be rejected.

Another concern involves the apparent contention of The Florida Bar to the effect that Respondent in fact performed no legal service of any kind during his employment by WOODBURN.

If that contention is valid, the cases all suggest that Respondent's charges for non-legal services are not subject to regulation by The Florida Bar. Until now all reported cases involving this issue have involved charges for what were clearly legal services. While support for a broader area of regulation can be found in some language contained in Rules Regulating The Florida Bar, until now The Florida Bar has not undertaken to regulate charges for non-legal services as it appears to be doing here.

If in fact the intent is to expand regulatory restrictions to income from both legal and non-legal services, Respondent respectfully urges that provisions for specific notice of such expansion be given all Florida attorneys at the earliest possible time in view of the potential impact of such a policy in major business and policy decisions currently being made by Bar members.

Regardless of the decision ultimately reached in that regard, there is nothing in the record to reflect the value of the services rendered WOODBURN by Respondent - an indispensable requisite for a finding of guilt of the charge.

The record does reflect clearly the position of The Florida Bar that Respondent's services to WOODBURN had no value as legal services. - not the same as saying they had no value at all. Studying and evaluating information supplied in the Martindale-Hubbell Biographical section the relative suitability of listees as candidates to represent WOODBURN is clearly a service, as is drafting

It should also be noted that Richardson is additional authority for the concept of requiring a refund only of the amount of fees deemed excessive.

Finally, the recommended sanctions must also be briefly addressed.

With respect to the aggravating factors cited by Referee/The Florida Bar, the first case cited involved a mis-communication between Respondent and counsel originally seeking assistance from Respondent. In that case, The Florida Bar falsely accused Respondent of conducting an unopposed trial on the question of attorney fees. That allegation was proved false by the testimony of the County Judge who presided at the non-jury trial of Respondent's suit for attorney fees, but notwithstanding the ruling of the County Court, Respondent was still found guilty of a fee violation.

The second case involved Respondent's approval of an advertisement run by a corporate client in the Florida Bar News. Respondent felt that since the advertisement was directed to lawyers only, it was not misleading.

Once The Florida Bar filed a complaint alleging the subject advertisement was improper, Respondent tendered a proposed admission of minor misconduct coupled with a proposed refund of all monies received as result of that advertisement.

Before restitution could be accomplished, Respondent was seriously injured in an automobile accident which severely impacted his income producing potential, and an installment payment plan was then agreed to by the parties and approved by the Court.

A more accurate interpretation of those events would be that they demonstrate Respondent's willingness to accept full responsibility for his actions, and rendering his full cooperation in connection with all investigations.

Respondent further submits that the absence of a dishonest or selfish motive, his full and free disclosure and cooperation in the conduct of these proceedings and the remoteness of these prior offences are mitigating factors that should have been considered and which demonstrably were not. Fla. Stds. Imposing Law Sancs. 9.32.

CONCLUSION

Several errors committed by the Referee in the course of this proceeding would normally require a reversal and new trial, but the misconduct of the Referee and Bar Counsel herein cannot be cured by anything short of outright dismissal of these proceedings.

The respective rules governing the conduct of judges and lawyers in Florida are concerned not only with sanctioning improper conduct, but also appearances of impropriety, which this Court has repeatedly emphasized. Such appearance can only be minimized by sanctions of those responsible for creating the problem - the Referee and Bar Counsel - and by procuring an amendment to Rules Regulating The Florida Bar to provide for appointment of a special prosecutor in the event of a repetition of this problem.

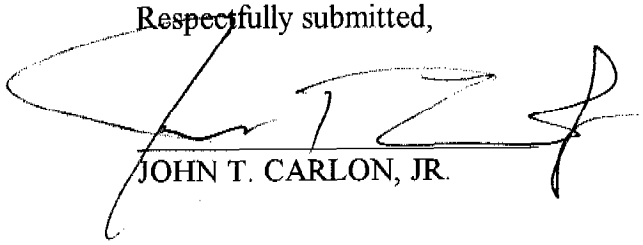
Alternatively, a new trial before a new Referee should be ordered because of the harmful errors of this Referee in ignoring respondent's timely request for a pretrial conference in direct violation of the mandate of Fla. R. Civ.P., and in denying Respondent's right to cross examine the complaining witness in two areas affecting her credibility, as well as the failure of The Florida Bar to present evidence of every recognized element of the charged offense.

Regardless of the path chosen by this Court, it is to be hoped that the issue of regulation of attorneys' conduct outside the scope of the practice of law will be clarified.

Finally, the relatively draconian sanctions recommended by the Referee should be rejected as inappropriate for this case. Any offense committed by Respondent - now as well as in the past - has been completely unintentional and Respondent has affirmatively demonstrated candor and cooperation throughout this proceeding along with acceptance of responsibility for his actions - now

and in the past. Respondent submits that a 91 day suspension under those circumstances is needlessly draconian.

Respectfully submitted,



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v.

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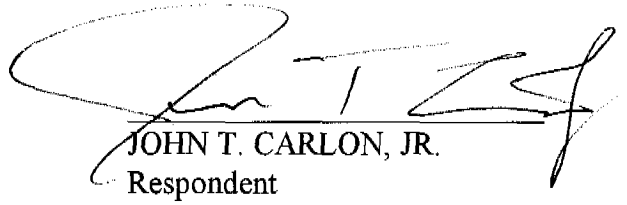
_____/

CERTIFICATE OF COMPLIANCE

Respondent, JOHN T. CARLON, JR., pursuant to Administrative Order of the Supreme Court of Florida dated July 13, 1998, hereby certifies that the foregoing Main Brief of Respondent has been reproduced in a font that is 12 point proportionately spaced Times Roman.

Respondent further certifies his compliance with Administrative Order of the Supreme Court of Florida dated February 5, 1999, and submits with paper copies of his Main Brief a properly formatted diskette of proper size.

Dated this 13 day of June, 2000.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have furnished a copy of Respondent's main Brief and Respondent's Appendix by U.S. Mail to each of the following:

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Billy Jack Hendrix, Esquire
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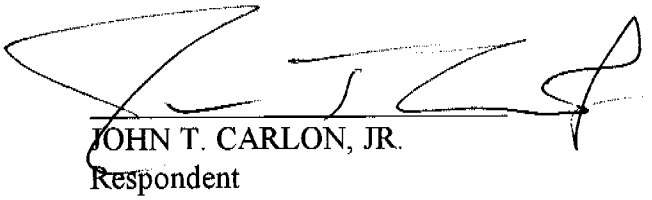
this 13 day of June, 2000.



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Appendix